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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 921

PACIFIC STEAMSHIP LINES LTD.
(a corporation),
Petitioner,

vs.

ROY W. CROSBY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals,
Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT.

May it please the Court:

Pacific Steamship Lines, Ltd., a debtor corporation under Section 77-B of the Bankruptcy Act, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause, numbered therein No. 10,155.

OPINION BELOW.

The opinion of the Court below (R. 678) is reported in 133 F. (2d) Adv. 470. There was no opinion in the District Court (Northern District of California).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 25, 1943 (R. 692). A petition for rehearing was seasonably made and entertained and denied (R. 693).

The jurisdiction of this Court in invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. § 347).

STATEMENT.

Petitioner is a debtor corporation in possession of its property under Section 77-B of the Bankruptcy Act, although the record contains neither a petition nor an order disclosing that fact (CCA Opinion, R. 678).

The respondent is a ship broker who, on January 17, 1941, filed a petition in the bankruptcy proceedings claiming a brokerage fee of $62,500.00 in connection with the sale of the Steamships H. F. Alexander and Emma Alexander, to the British Ministry of Shipping (now, and in the proceedings referred to as the British Ministry of War Transport). The matter was referred and re-referred to a Special Master for hearing. The

issue raised was whether the respondent broker procured the British Ministry of War Transport as a purchaser, or whether the petitioner made the sale direct, without the aid of any broker (CCA Opinion, R. 678).

At the hearing before the Special Master, John J. Walsh, called by the petitioner, testified that he was the British Ministry of War Transport on the Pacific Coast, an arm of the British Government (Master's Certificate, R. 49), and that he purchased the vessels directly from the petitioner for the British Ministry of War Transport; that he did not know the respondent nor his associates, and had no dealings with them (R. 520-522). On cross-examination he admitted he had correspondence with the New York British Ministry of War Transport in connection with the purchase of said vessels; that such correspondence dealt with other vessels (R. 532) and refused to produce such correspondence on the ground that the correspondence belonged to the British Government, that under his instructions it was confidential and not to be disclosed to anyone outside of the British Government (R. 529). The Special Master refused to order the production of the correspondence and the respondent moved to strike the testimony of the witness on the ground that the witness refused to submit to cross-examination, which motion was denied (R. 530). The Special Master, in his certificate and report, recommended the dismissal of the petition, which was approved by the order of the District Court (R. 28), from which order, the appeal was taken (R. 88).

The Circuit Court of Appeals for the Ninth Circuit reversed the District Court, and in its opinion stated (R. 678, 691):

> "The parties assume that appellee is under the jurisdiction of the court below in a proceeding under § 77B of the Bankruptcy Act. The record before us contains neither a petition nor an order disclosing that fact, but we treat the assumption of the parties as a concession of the fact." (R. 678.)
>
> "* * * All we can hold here is that it was error to refuse to compel Walsh to produce the correspondence for the inspection of the special master to determine their admissibility in evidence, because of an absence of showing: (1) existence of a rule of the British Ministry of Shipping that all correspondence between its officers is confidential; (2) existence of a direction, by an officer superior to Walsh, to Walsh that the correspondence is confidential; (3) existence of a direction to Walsh by an officer superior to Walsh, authorizing the latter to determine what correspondence is confidential; and (4) how the correspondence would in any manner jeopardize the public interest, safety or security." (R. 691.)

QUESTIONS PRESENTED.

The questions presented are:

1. Whether the head of the British Ministry of War Transport on the Pacific Coast is competent to determine that correspondence between the British Ministry of War Transport on the Pacific Coast and

the British Ministry of War Transport on the Atlantic Coast of the United States, relative to purchase of vessels in time of war, contains secrets of state and are privileged communications.

2. Whether the head of the British Ministry of War Transport on the Pacific Coast is a public officer within the meaning of Section 1881 (5) of the California Code of Civil Procedure, and the correspondence between the British Ministry of War Transport on the Pacific and Atlantic Coasts was officially confidential within the meaning of that statute.

3. Has the Circuit Court of Appeals for the Ninth Circuit, jurisdiction to reverse the order of the District Court in a bankruptcy action, where in its own opinion, it appears that the record on appeal contains neither a petition nor an order disclosing that the proceeding is under the Bankruptcy Act.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court below deals with a question of international law of great public importance in this time of war with respect to the privilege of communications containing secrets of state, in connection with the purchase and movement of vessels by an ally of the United States, the disclosure of which might aid and assist the enemy.

2. The decision of the Court below conflicts, in principle, with the decision of this Court in the early case of *Totten v. United States* (1875), 92 U. S. 105,

23 L. Ed. 605, wherein the principle is laid down that a suit cannot be maintained against the government in the Court of Claims upon a contract for secret services during the Civil War for the reason that it would be necessary to expose the details of dealings with individuals and officers with serious detriment to the public.

3. The decision of the Court below conflicts with the English case of *Beatson v. Skene* (1860), 5 Hurlst. & N. 838, 157 English Rep. (Reprint) 1415, 9 A.L.R. 1103 (note), in which it was held that the question whether the production of the documents would be injurious to the public service, must be determined not by the judge, but by the head of the department having the custody of the paper.

4. The decision fails to properly apply the provisions of the law of the State of California, set forth in *California Code of Civil Procedure,* Section 1881 (5), which provides that "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure."

5. The decision of the Court below is in conflict with Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, which grants to the witness the privilege to refuse to disclose a matter on the ground it is a secret of state unless the judge finds otherwise, or the head of the department consents to its disclosure.

6. The decision of the Court below, in assuming jurisdiction, is in direct conflict with the decision of

this Court in *Clune v. United States,* 159 U. S. 590, 593, 40 L. Ed. 269, and in *Redfield v. Parks,* 130 U. S. 623, 624, 625, 32 L. Ed. 1053, and is contrary to its own prior decision in *Hutson v. Coffman* (CCA 9), 100 F. (2d) 640, 641.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted to review those portions of the judgment of the Court below embraced within the questions presented supra.

Dated, San Francisco, California,
April 12, 1943.

KEITH R. FERGUSON,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

Stated in the petition, supra.

JURISDICTION.

Stated in the petition, supra.

STATUTE INVOLVED.

The pertinent provisions of the statute involved, are:

California Code of Civil Procedure, Section 1881 (5),

which reads as follows:

"A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

RULES INVOLVED.

Federal Rules of Civil Procedure, Rule 43 (a), which reads as follows:

"Rule 43. Evidence.

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States

or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Rule 227 of the *Model Code of Evidence*—Presented by the American Law Institute,

which proposes the following rule of evidence:

"Rule 227. Secret of State.

(1) As used in this Rule, 'secret of state' means information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States or a State or Territory, or concerning international relations.

(2) A witness has a privilege to refuse to disclose a matter on the ground that it is a secret of state, and evidence of the matter is inadmissible unless the judge finds that

(a) the matter is not a secret of state, or

(b) the chief officer of the department of government administering the subject matter which the secret concerns has consented that it be disclosed in the action."

ARGUMENT.

1. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT WALSH AS THE BRITISH MINISTRY OF WAR TRANSPORT ON THE PACIFIC COAST, WAS NOT COMPETENT TO DETERMINE THAT THE CORRESPONDENCE CONTAINED SECRETS OF STATE AND THEREFORE WAS INADMISSIBLE.

The Circuit Court in its opinion states the reason for its ruling in the following language (R. 689):

> "Does this mean that Walsh is the final authority on that point? All reason says that the question is one for the Court to determine."

The English case of *Beatson v. Skene* (1860), 5 Hurlst. & N. 838, 157 Eng. Rep. (Reprint) 1415, at 1421, 9 A.L.R. 1103 note, explains the reason why the determination must be made by the head of the department having the custody of the papers in the following language:

> "We are of opinion that if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises how is this to be determined.
>
> "It is manifest it must be determined either by the presiding Judge or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine without ascertaining what the document was and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private and which taking place in *public* may do all the mischief which it is proposed to guard against.
>
> "It appears to us, therefore, that the question whether the production of the documents would be

> injurious to the public service must be determined, not by the Judge but by the head of the department having the custody of the paper;"

The correspondence admittedly concerned the purchase not only of the H. F. Alexander and Emma Alexander, but other vessels (R. 532), by the British Government. The Special Master explained his refusal to order the production of the correspondence in his certificate and report (R. 49) as follows:

> "As I then saw the situation and as I still do anything which in view of the war might tend to make public secrets of state of the British Government also might be to the detriment of the United States Government, the ally de facto, if not de jure, of the British in their fight against dictatorship."

In the Southern District of New York, Circuit Judge Lacombe in the case of *Kessler v. Best,* 121 Fed. 439, stated, with respect to the objection that the documents were privileged as belonging to the German consulate, that the privilege was that of the German Government and not of the witness. So, in this case, the privilege was that of the British Government, to whom the correspondence belonged, under the testimony of the witness, and could not be produced without the waiver of the privilege by the British Government.

This ruling is shown as one of the reasons for the proposed Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, as shown by the comment following the rule, which states that

the rule is phrased in terms of privilege and of admissibility so that either the witness or a party may object to a question calling for disclosure.

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2. THE CIRCUIT COURT OF APPEALS ERRED IN MISINTERPRETING THE CALIFORNIA LAW SET FORTH IN SECTION 1881 (5) OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

The Circuit Court of Appeals, in its decision, in referring to Section 1881 (5) of the *California Code of Civil Procedure,* states (R. 689):

> "There are grave doubts whether that statute has any application here. Does it not refer to a 'public officer' of California, only? By its terms it applies only to communication 'made to him'."

The demand of the respondent was for all of the correspondence of the British Ministry relating to the Steamships H. F. Alexander and Emma Alexander, whether written by the witness Walsh or by members of the British Ministry at New York. Prior to the enactment of the Rules of Federal Procedure, the Circuit Court of Appeals for the Eighth Circuit, in the case of *First Trust Company of St. Paul v. Kansas City Life Insurance Co.,* 79 F. (2d) 48, by Circuit Judge Stone, states:

> "In so far as such privilege exists it does so in accordance with statutory requirement and the statute involved is that of the state where the action is tried. (Conn. Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 253-256, 5 S. Ct. 119, 28 L. Ed. 708; Mutual Benefit L. Ins. Co. v. Robison, 58 F. 723, 730-732, 22 L.R.A. 325 [C.C.A. 8])—in

this instance the above section of the Minnesota statutes."

There appears to be no statute of the United States allowing the admission of correspondence containing "secrets of state". The fact that the American Law Institute in its *Model Code of Evidence,* Rule 227, presents the rule, not only of privilege of the witness, but of inadmissibility to be exercised by either the witness, the party, or even the judge, shows that the statute of California, properly interpreted, excludes the evidence.

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3. THE CIRCUIT COURT OF APPEALS ERRED IN ASSUMING JURISDICTION AND REVERSING THE DECISION OF THE DISTRICT COURT WHERE ON THE FACE OF ITS OWN OPINION IT HAD NO JURISDICTION.

The opinion of the Circuit Court of Appeals (R. 678) states that there was "neither a petition nor an order disclosing" the jurisdiction of the District Court under 77-B of the Bankruptcy Act and the lack of jurisdiction is apparent under the decisions of this Court in *Clune v. United States,* 159 U. S. 590, 593, 40 L. Ed. 269, and *Redfield v. Parks,* 130 U. S. 623, 624, 625. In its own prior decision, that of *Hutson v. Coffman* (C.C.A. 9th), 100 F. (2d) 640, 641, the Ninth Circuit Court of Appeals held:

> "The record does not contain the petition for involuntary bankruptcy nor the petition of the debtor under 77B of the Bankruptcy Act, 11 U.S.C.A. 207, which are necessary to show the jurisdiction of the Court and the regularity of the proceedings. Cf. 28 U.S.C.A. 790."

CONCLUSION.

It is respectfully submitted that "secrets of state" in this time of war should be held privileged as set forth in Rule 227 of the *Model Code of Evidence,* presented by the American Law Institute, and that a writ of certiorari should be issued.

Dated, San Francisco, California,
April 12, 1943.

KEITH R. FERGUSON,
Attorney for Petitioner.

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Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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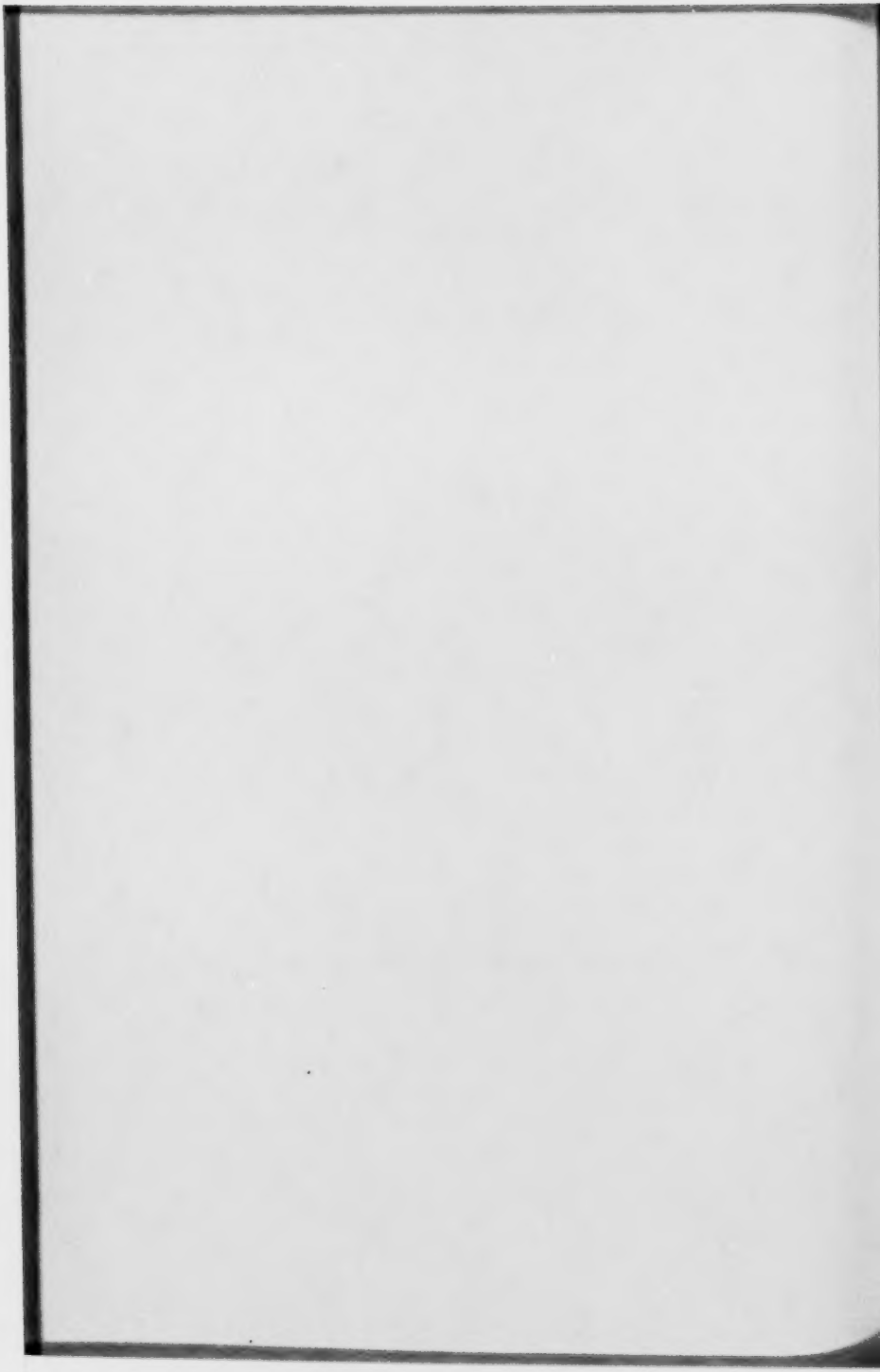

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JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 25, 1943 (R. 692). A petition for rehearing was seasonably made and denied (R. 693).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. §347).

QUESTIONS PRESENTED.

1. Whether it was reversible error for the Special Master to refuse to strike the testimony of the witness Walsh from the record for refusal to produce correspondence relating to the matters concerning which he testified on direct examination.

2. Whether the head of the British Ministry of War Transport of the Pacific Coast is a public officer within the meaning of Section 1881(5) of the Code of Civil Procedure of the State of California.

3. Whether the Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal.

STATUTE INVOLVED.

The pertinent provisions of the statute involved are:

California Code of Civil Procedure, Section 1881(5),

which reads as follows:

> "A public officer cannot be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure."

STATEMENT.

Respondent is a ship broker duly licensed under the laws of the State of California. He was employed by petitioner, a corporation under the jurisdiction of the Bankruptcy Court in a proceeding under 77B of the Bankruptcy Act, to find a purchaser for the "Emma Alexander" and the "H. F. Alexander", two vessels owned by petitioner (R. 98). Respondent was to be paid a commission of 5% of the sale price in the event he should produce such a purchaser (R. 605). Respondent and his associates submitted the vessels to the British Ministry of Shipping, now British Ministry of War Transport, in September or October of 1940 (R. 459), and continued negotiations with the British Ministry of War Transport until respondent was advised that the vessels had been sold to the Ministry of War Transport on March 10, 1941 (R. 168). Petitioner was kept advised at all times of the progress of respondent's efforts to sell the vessels to the British Ministry of War Transport (R. 171). On January 3, 1941, the British Ministry of War Transport advised respondent that it was interested in the purchase of the vessels (R. 160), and this information was communicated to Mr. James, president of petitioner (R. 161). Mr. James thereupon entered into direct negotiations with Mr. Walsh, the San Francisco representative of the British Ministry of War Transport (R. 573), and as a result of such negotiations the sale of the vessels was consummated. Mr. James did not advise respondent that he was dealing direct with Mr. Walsh (R. 172). After the sale petitioner refused to pay respondent a commission on the sale (R. 635). At

the hearing before the Special Master Mr. Walsh testified without protest upon direct examination to the instructions received by him from the New York office of the British Ministry of War Transport in connection with the sale of the vessels, and on cross-examination testified that the sale was the subject of considerable correspondence between the San Francisco office and the New York office of the British Ministry of War Transport. Mr. Walsh refused to produce any of the correspondence passing between his office and the New York office, and the Special Master refused to direct the witness at the request of counsel for petitioner to produce such correspondence (R. 530 et seq.).

ARGUMENT.

1. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT IT WAS ERROR FOR THE SPECIAL MASTER TO REFUSE TO STRIKE THE TESTIMONY OF THE WITNESS WALSH FROM THE RECORD FOR REFUSAL TO PRODUCE HIS CORRESPONDENCE RELATING TO THE MATTERS TO WHICH HE TESTIFIED ON DIRECT EXAMINATION.

The right of cross-examination is a fundamental right and the opposing party is entitled to question a witness with regard to any relevant matter concerning which he testified on direct examination, including the right to have the court direct the witness to produce written evidence relating to such matter. A witness should not be permitted to testify on direct examination and refuse to submit to cross-examination on the claim of privilege, and we submit it is immaterial whether or not Mr. Walsh had the right to claim

immunity. The fact remains that he did testify on direct examination, and having done so, it was the duty of the Special Master to direct him to produce any correspondence requested by counsel relating to the matter testified to on direct examination.

In the case of *Thomas v. Dower* (Wash.), 297 P. 1094 (1931), the court said:

> "Cross-examination is a valuable right, and where a witness refuses to answer thereon questions which are proper and material subject of inquiry, in view of the testimony which he gave upon his direct examination, his entire testimony will be stricken or disregarded. Millikan v. Booth, 4 Okl. 713, 46 P. 489; Cumberland R. Co. v. Girdner, 174 Ky. 761, 192 S. W. 873; McElhannon v. State, 99 Ga. 672, 26 S. E. 501; People v. Freshour, 55 Cal. 375. The trial court properly eliminated the testimony of the appellant."

See also:

Cumberland R. Co. v. Girdner (Ky.), 192 S. W. 873 (1917);

United States v. Keown, 19 F. Supp. 639 (1937);

Aluminum Industries, Inc. v. Egan, 61 Ohio App. 111, 22 N. E. (2d) 459 (1938).

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2. THE SAN FRANCISCO REPRESENTATIVE OF THE BRITISH MINISTRY OF WAR TRANSPORT WAS NOT A PUBLIC OFFICER.

It is submitted that it is too clear for argument that the local representative of the British Ministry of War

Transport is not a public officer within the meaning of Section 1881(5) of the Code of Civil Procedure of the State of California. The record fails to show that the correspondence requested contained communications made to him in official confidence or that the public interest would suffer by any disclosure.

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3. THE CIRCUIT COURT OF APPEALS CORRECTLY ASSUMED JURISDICTION OF THE APPEAL.

The record contains numerous references to the fact that the respondent was under the jurisdiction of the Bankruptcy Court in a 77B proceeding (R. 55, 56, 176, 179, 435, 493), and we therefore respectfully submit that the Circuit Court of Appeals properly assumed that the proceedings were subject to the jurisdiction of the Bankruptcy Court.

CONCLUSION.

It is therefore respectfully submitted that the petition should be denied.

Dated, San Francisco, California,
April 28, 1943.

SIDNEY M. EHRMAN,
Attorney for Respondent.